

IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

CHAUFFEURS, TEAMSTERS, AND HELPERS,  
LOCAL UNION NO. 198,

Petitioner/Respondent

and

STATE OF MONTANA BOARD OF PERSONNEL APPEALS,  
Respondent,  
Appellants.

-vs-

CITY OF BILLINGS,

Petitioner/Respondent and Respondent.

Appeal from District Court of the Thirteenth Judicial District,  
In and for the County of Yellowstone, The Honorable  
Diane G. Ray, Judge presiding.

Counsel of Record:

For Appellants:

Hilley and Loring, Great Falls, Montana 761-3100  
James Gardner, Jr., Helena, Montana 449-5600

For Respondent:

R. D. Peterson; Peterson, Schofield & 252-6679  
Leckie, Billings, Montana

Submitted on Briefs: April 15, 1982

Decided: August 5, 1982

Filed: AUG 5- 1982

*Thomas J. Kearney*  
Clerk

Law Court.

Susan Carlson, an animal warden employed by respondent, was terminated on March 12, 1980. Appellant Board of Personnel Appeals (BPA) found that she had been discharged because of her union activities, in violation of section 39-11-401(1) and (3), MCA, and ordered her reinstated with back pay. The District Court reversed the BPA's ruling because of improper procedure. We vacate the District Court decision and remand the case for further consideration by the BPA, section 2-4-704(2), MCA.

Initially, we note that the brief of Carlson's bargaining representative, appellant Chauffeurs, Teamsters and Helpers, contains no references to the record for any assertions contained in its statement of facts, in violation of Rule 23(a) (3), M.R.App.Civ.P. As an appellate court, we are usually confronted with at least two conflicting versions of what the dispositive facts in a given case are. The above rule was instigated so that we needn't search the entire transcript for each "fact" asserted by a party. To do so merely lengthens the time necessary for the preparation of the opinion and prolongs any final determination of the case.

Carlson was first employed by respondent on January 17, 1977, as a water department clerk. On July 1, 1977, she began work as a meter maid. She became active in the union representing city employees at that time, the American Federation of State, County and Municipal Employees (AFSCME) and filed a grievance against respondent.

On October 3, 1977, Carlson began working as an animal warden at the city animal shelter and shortly thereafter she

became shop steward. She served as steward for AFSCME until the end of May 1979. During that time she filed about six grievances including one alleging harassment by her supervisor which culminated in her supervisor being sent a warning to discontinue the harassment. In April 1979, this supervisor was replaced by another supervisor, Darlene Larson.

In late May 1979, appellant Teamsters defeated AFSCME as the city employees' bargaining representative and, since objections to the election were filed, the Teamsters were not certified by BPA until October 1979. During this time, Carlson received several written reprimands, including warnings for having an unauthorized rider in the animal van and conducting herself improperly at the animal shelter. On September 25, 1979, Larson completed an evaluation form on Carlson which rated her above average in most categories, after which time Carlson received a merit pay increase. In October 1979, Carlson was suspended for four days "because of insubordination and failure to obey direct orders" involving a leg problem and the suspension letter concluded with the statement that "any further violations will result in immediate dismissal." Due to the changeover in unions and election objections, there was no grievance procedure in effect at this time.

On February 2, 1980, during the contract negotiations between the Teamsters and the City, Carlson voiced her concerns about the working conditions at the animal shelter and on the next working day, Larson told Carlson she shouldn't have said what she did and that her facts were wrong. The first contract between the Teamsters and respondent was signed in mid-May 1980. The final event which precipitated Larson's termination involved a male schnauzer dog which

Carlson had picked up running at large on March 3, 1980. Carlson did not check the animal in at the shelter because she believed it belonged to a friend of hers (Ostwald) who had reported that his dog was missing. After finding the dog and talking to Ostwald, Carlson kept the dog at her residence at Ostwald's request because he was in the hospital.

On March 5, 1980, another person who had lost a male schnauzer (Wertz) called the shelter. Larson then called Carlson who informed her that the dog had been returned to its owner. On March 7, Wertz called Larson from Ostwald's home, convinced that the dog was being hidden from her there. Carlson and Larson went to Ostwald's home and, after initially denying that Carlson had given him the dog, Ostwald admitted that he once had a male schnauzer but that he didn't have it any longer. Carlson stated the dog was at Shepherd, Montana (where Carlson lived), but that nobody was home. After further discussion, she stated the dog was at her house but refused to take Larson there. The assistant chief of police ordered Carlson (accompanied by Larson) to retrieve the dog from her home in Shepherd and Carlson complied, returning the dog to the shelter. At the shelter, Wertz claimed the dog was hers and a veterinarian who had cared for the dog corroborated her story. Carlson gave the dog to Wertz.

On March 10, 1980, Carlson was discharged by Larson in a letter which included the following statements:

"Due to insubordination and non-cooperation with your supervisors on incidents relating to events the week of March 3 to March 8, you are hereby terminated as of today.

"You were not cooperative in being truthful with me as to the whereabouts of a male schnauzer captured by you while on duty, March 3, nor in my

efforts to clear the situation with a public citizen's suspicions of the shelter and you concerning the dog.

"You have been previously warned on more than one occasion about cooperating with other city employees."

On March 17, 1980, Carlson filed an unfair labor practice complaint with the BPA. She alleged that the above reasons were pretextual and that the actual reason for her termination was her union activity, a violation of section 19-11-401 (1) and (3), MCA. A BPA-appointed hearing officer decided in Carlson's favor ordering respondent to reinstate her with back pay and this recommendation was adopted by the BPA. Respondent refused to do so and on May 5, 1981, the Teamsters filed a petition for enforcement in the District Court. On May 11, 1981, respondent filed a petition to review the BPA's final order and the cases were consolidated. On November 9, 1981, the District Court reversed the BPA and this appeal followed.

Before we begin discussing the issues involved in this case, a few words about our standard of review are in order. Both the District Court's and this Court's standard of review are dictated by section 3-4-704(2), MCA, which provides as follows:

"(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

"(a) in violation of constitutional or statutory provisions;

"(b) in excess of the statutory authority of the agency;

"(e) made upon unlawful procedure;

"(d) affected by other error of law;

"(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

"(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

"(g) because findings of fact, upon issues essential to the decision, were not made although requested."

The District Court reversed the BPA on two grounds of unlawful procedure, a legitimate subject of inquiry under section 2-4-704(2)(c), MCA. The District Court first found the BPA erred in giving primary weight to evidence of Carlson's union activities occurring more than six months prior to the filing of her unfair labor practices claim. The District Court also found that the BPA erred in excluding evidence of Carlson's discipline problems prior to her merit increase. Thus we frame the issues on appeal as follows:

1. Whether the District Court erred in reversing the BPA because it gave primary weight to incidents that occurred more than six months prior to the filing of Carlson's claim;
2. Whether the District Court erred in reversing the BPA because it did not admit evidence of Carlson's work history prior to her merit increase;

With regard to the first issue, the District Court found that the BPA erred in according substantial weight to Carlson's union activities occurring more than six months prior to the filing of her claim.

Conclusion of law no. 2 reads: "The Board erred in giving primary weight to union activities which occurred more than six (6) months prior to the filing of the claim of unfair labor practices."

In the court's memorandum accompanying its findings and conclusions, we find the following sentence: "The only evidence of union activity falling within the period is Carlson's appearance at negotiating sessions on February 2, 1980, wherein she appeared with about 25 other City employees to discuss conditions of their working areas."

In support of its decision, the District Court cited section 39-31-404, MCA and N.L.R.B. v. MacMillan Ring-Free Oil Co., Inc. (9th Cir. 1968), 394 P.2d 26. Section 39-31-404, provides as follows:

"39-31-404. Six-month limitation on unfair labor practice complaint--exception. No notice of hearing shall be issued based upon any unfair labor practice more than 6 months before the filing of the charge with the board . . ."

Respondent City cites MacMillan, *supra*, also and Sious Quality Packers v. N.L.R.B. (8th Cir. 1978), 581 P.2d 151, in support of the proposition that the BPA should not have used evidence of Carlson's activity occurring outside the six-month period as the principal foundation for its reasoning. The Teamsters Union does not dispute the rationale of these cases but argues that they are inapplicable here because they hold that the six month period applies to the employer's activities and not the employee's. Appellant BPA contends that the federal equivalent of section 39-31-404, MCA, has never been interpreted the way the District Court did in this case and argues further that it is a statute of limitations barring the filing of a claim on an incident after six months, and not a rule of evidence prohibiting the consideration of relevant testimony concerning anti-union animus which is six months or more old.

All parties agree that section 39-31-404, MCA, is substantially similar to the National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1976) and interpretations thereunder are pertinent here.

The District Court properly relied on MacMillan for the proposition that a violation within the six-month period must stand on its own:

"To recapitulate, then, we hold that while evidence of events occurring more than six months before the filing of a charge may be used to 'shed light' upon events taking place within the six-month period, the evidence of a violation drawn from within that period must be reasonably substantial in its own right." 394 F.2d at 33.

However, the actual holding of that case revolves around the charge of the employer's (MacMillan's) refusal to bargain with the union and the focus on the whole case is on the employer's activities and lack of promptness. The court continues from the above quote by saying:

"Where, as here, that condition is not met, it is impermissible under the policies embodied in section 10(b) for a finding of an unfair labor practice to be justified by primary reliance on the earlier events. Thus the Board's conclusion that MacMillan improperly refused to bargain with the union during the applicable limitations period cannot be upheld." 394 F.2d at 33.

The District Court erred in applying section 39-31-404, MCA, to Carlson's union activities and other interpretations of its federal counterpart bear this out. In Wilson Freight Co. (1978), 234 N.L.R.B. 844, 97 L.R.R.M. 1412, rev'd. on other grounds (1979), 604 F.2d 712, an employee (Smith) filed a number of grievances and was active in the union prior to his discharge for conduct exceeding his authority as a shop steward. The administrative law judge noted with regard to the employer's answer:



"It also raised as an affirmative defense that the activities in which Smith is alleged to have engaged in occurred more than 6 months prior to the filing of the unfair labor practice charge, therefore the matter is barred by Section 10(b) of the Act.

"...:

"Section 10(b) of the Act is unambiguous in clearly stating that it is the unfair labor practice, not the employees' concerted or union activity, which must be within the 10(b) period. The unfair labor practice in the present case occurred with Smith's discharge on September 3, 1976. Smith filed the unfair labor practice charge based upon this discharge on October 28, 1976. Therefore, Smith is well within the 10(b) period and I reject Respondent's affirmative defense in this regard." (Emphasis added.) 234 N.L.R.B. at 849, 97 L.R.R.M. at 1412.

Another case worthy of note is Inland Steel (1981), 257 N.L.R.B. No. 13 (4 18,239), 107 L.R.R.M. 1456. In Inland Steel, an employee had been active in his union (filing a number of complaints) and in workers' rights movements prior to his voluntary termination of employment. The N.L.R.B. found that his employer refused to hire him seven months later because of his union activities during his prior employment. There is no indication of union activities during his unemployment. Although the six month statute is not specifically addressed, the N.L.R.B. clearly examined and based its decision on the employee's activity which occurred more than six months prior to the filing of the claim.

In Axelson Manufacturing Co. (1950), 88 N.L.R.B. 761, 25 L.R.R.M. 1388, the National Labor Relations Board held:

"The employer asserts that Section 10(b) of the amended NLRA prohibits the introduction of evidence as to events occurring more than six months prior to the service of the charge. This contention is without merit.

"Section 10(b) forbids the issuance of complaints and consequently findings of violations of the

statute based on conduct which did not occur within the six months' period. However, it does not forbid the introduction of relevant evidence bearing on the issue of whether a violation has occurred during the six months. Section 10(b) enacts a statute of limitations and not a rule of evidence." (Emphasis added.) Axelson, 88 N.L.R.B. at 765-66, 25 L.R.R.M. at 1388.

Section 39-11-404, MCA, requires an employee to file a charge with the BPA within six months after an alleged unfair labor practice. Here the alleged unfair labor practice occurred on March 10, 1980, and Carlson filed her complaint on March 17, well within the six month period. The construction placed on the statute by the District Court is not borne out by the above cases or by the language of the statute itself. See also Local Lodge No. 1424 v. N.L.R.B. (1960), 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832.

The second issue relates to the BPA's failure to consider Carlson's conduct prior to her merit increase. The hearings officer made the following statements, which were adopted by the BPA:

"All of the events which occurred prior to Carlson's merit increase must be ignored as far as the City's argument in support of its decision is concerned. At the time of the merit increase Carlson was considered to be just that -- an employee worthy of a merit increase."

The District Court stated the following with regard to this issue:

"In examining whether the City had met its burden of proof, the Board excluded from consideration all evidence of disciplinary problems relative to Carlson prior to her merit increase of October 3, 1979. Such exclusion has no basis in statutory or case law and was therefore improper. The fact, that an employer chooses to give a merit increase does not cause an employee's work history to vanish. It remains relative to the overall picture, and to ignore it is to place an unwarranted, artificial limitation on the employer's review process."

Respondent City argues that a satisfactory performance rating does not erase prior disciplinary actions, citing Rockland-Basberg Print Works, Inc. (1977), 231 N.L.R.B. 305, 95 L.R.R.M. 1237 and Concrete Technology, Inc. (1976), 224 N.L.R.B. 961, 93 L.R.R.M. 1282. The Teamsters have not referred us to any case which directly holds (as the hearings officer did) that all events occurring prior to a pay raise must be ignored; however, a number of cases are cited where unlawful discharges were found after pay increases were given, including N.L.R.B. v. Evans Packing Co. (6th Cir. 1972), 463 F.2d 193; Lynch-Davidson Motors, Inc. (1970), 183 N.L.R.B. 841, 76 L.R.R.M. 1484 and Draggoo Electric Co., Inc. (1974), 214 N.L.R.B. 847, 88 L.R.R.M. 1112.

The District Court's position on this issue was correct and the hearing officer should have included evidence of events occurring prior to Carlson's merit increase. The hearing officer cited no authority for his position and the union has not cited any case directly on point. We find the more persuasive reasoning to be along the lines of the cases cited by the City above. For this reason, we remand this case to the BPA for consideration and a decision in light of events occurring prior to Carlson's merit increase as well as subsequent happenings.

Although not necessary to a resolution of this case, we will comment briefly on the other issues raised by appellant not previously addressed herein. Appellant argues that the District Court erred in considering alleged misconduct not mentioned in the notice of discharge, citing Board of Trustees v. Superintendent of Public Instruction (1977), 171 Mont. 323, 557 P.2d 1048. In support of this contention appellant quotes the following paragraph from the notice of discharge:

"Due to insubordination and noncooperation with your superiors on incidences relating to events the week of March 3 to March 8, you are hereby terminated as of today."

Appellant contends that only events relating to the schmauxer incident, i.e., the events occurring in the week of March 3 to March 8, should have been considered. However, a close examination of the rest of the letter (set out verbatim earlier in this opinion) indicates the basis of the charge was Carlson's noncooperation with other employees including her supervisors. There is a sufficient nexus between the other incidents considered by the District Court reflecting Carlson's noncooperation and the discharge letter to warrant the District Court's action.

Appellant next contends that the District Court erred in shifting the burden from the employer to the employee, pointing to the following language in the District Court's findings of fact:

"Susan Carlson did not show by reliable probative and substantial evidence on the whole record that the City would not have discharged her but for her union activity."

We recently adopted the "but for" test enunciated in Mt. Healthy City School District Board of Education v. Doyle (1977), 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471, for dual motivation cases under Montana's Collective Bargaining Act, Board of Trustees v. State ex rel. Board of Personnel Appeals (1979), \_\_\_ Mont. \_\_\_, 604 P.2d 770, 36 St.Rep. 2289.

In Board of Trustees, we quoted from the Mt. Healthy opinion as follows:

"Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'--or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however,

the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 429 U.S. at 285-287, 97 S.Ct. at 575-576. Mont. at \_\_\_, 604 P.2d at 777, 36 St.Rep. at 2297.

Here the District Court's statement was inaccurate.

The Mt. Healthy test in this case required Carlson to show that her protected union activity was a substantial or motivating factor in the City's determination to discharge her. The burden then shifts to the City to show that it would have terminated her, absent her protected activity, i.e., it would be an unfair labor practice by the City if, but for Carlson's union activity, she would not have been terminated.

Finally, appellant contends that the District Court erred in substituting its judgment for that of the agency on questions of fact. As an example, appellant refers us to the District Court's findings that "Carlson was untruthful, devious, deceptive" and that "[i]t is clear that the incident which resulted in her termination was sufficient cause for discharge without any previous warnings." Appellant argues there were no such findings of fact made by the hearings officer.

It is true that a court may not substitute its judgment for the agency's on questions of fact, section 2-4-704(2), MCA. Although these statements appear in the District Court's findings of fact, they are actually conclusions drawn from the facts found by the hearings officer, which the District Court accepted in finding of fact no. 3. There was no error committed by the District Court in this regard.

Vacated and remanded for proceedings not inconsistent with this opinion.

*Donald L. Haswell*  
Chief Justice

We concur:

Sam S. Paly

Jack B. Minor

Will E. Fisher  
Justice

1 IN THE DISTRICT COURT  
2 OF THE THIRTEENTH JUDICIAL DISTRICT  
3 OF THE STATE OF MONTANA,  
4 IN AND FOR THE COUNTY OF YELLOWSTONE

5 CITY OF BILLINGS, a Montana  
6 Municipal Corporation,

7 Petitioner.

8 vs.

9 STATE OF MONTANA BOARD OF PERSONNEL  
10 APPEALS and CHAUFFEURS, TEAMSTERS  
11 AND HELPERS, LOCAL UNION NO. 190,

12 Defendants.

NO. DV 83-469

JUDGMENT

13 This matter came on regularly before this Court. The matter was  
14 briefed and argument was heard before the Court, and the Court considered  
15 the briefs, oral argument and reviewed the record and entered its Order  
16 dated February 7, 1985 which by reference is incorporated herein.

17 NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision  
18 of the Board of Personnel Appeals is supported by substantial evidence on  
19 the whole record and there has been no error of law warranting reversal  
20 under the standards of review of the Montana Administrative Procedure  
21 Act, Section 2-4-704 MCA. The decision of the agency ordering reinstatement  
22 of Susan Carlson and full back pay is affirmed.

23 JUDGMENT ENTERED this 31 day of July, 1985.

24 WILLIAM J. DEAN

25 DISTRICT COURT JUDGE  
26  
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IN THE DISTRICT COURT OF THE THIRTEENTH  
JUDICIAL DISTRICT OF THE STATE OF MONTANA  
IN AND FOR THE COUNTY OF YELLOWSTONE

CITY OF BILLINGS, a Montana  
Municipal Corporation,

Petitioner,

vs.

STATE OF MONTANA BOARD OF PERSONNEL  
APPEALS AND CHAUFFERS, TEAMSTERS AND  
HELPERS, LOCAL UNION NO. 190,

Defendants.

Judge William J. Spurgin

No. DY 83-469

OPINION AND ORDER

This matter came on regularly before this Court on Petition for Judicial Review as provided in the Administrative Procedure Act of the State of Montana. The Petitioner, The City of Billings, appeared through its attorney, K. D. Peterson of Peterson, Schofield & Leckie. The State of Montana Board of Personnel Appeals appeared through its attorney, James Gardner. Chauffers, Teamsters and Helpers, Local Union No. 190 appeared by its attorney Emily Loring of Hilley & Loring. The matter was briefed, and argument was had before the Court, and the Court has considered the briefs, the oral argument and has reviewed the record herein.

This case was remanded by the Montana Supreme Court to the Board of Personnel Appeals in City of Billings versus BPA and Teamsters, 648 P.2d 1169 (1982). The hearing examiner at the BPA reviewed the facts of this case, pursuant to the Montana Supreme Court's order of remand. The hearing examiner determined that after considering all relevant facts, and employing the dual motivation test, the City of Billings terminated Sue Carlson in violation of Sections 39-31-401(1) and (3) MCA.

On February 2, 1983, the Board of Personnel Appeals adopted the appended recommended order of the hearing examiner as the final order of the Board.



1 This is a review of the final order of the Board of  
2 Personnel Appeals and that final order is reviewable pursuant to  
3 Section 2-4-702 MCA. Venue is in Yellowstone County, Montana.

4 The hearing examiner for the Board of Personnel Appeals  
5 has found the facts in this case and these facts are accepted by the  
6 Court. The Court may not substitute its judgment for that of the  
7 agency as to the weight of the evidence on questions of fact.

8 This case requires application of the "but for" test  
9 enunciated in Mt. Healthy City School District Board of Education  
10 vs. Boyle, 429 U.S. 274 (1977). This test has been adopted by the  
11 State of Montana for dual motivation cases under Montana's Collective  
12 Bargaining Act. As applied in this case, the Mt. Healthy test required  
13 Carlson to show that her protected union activity was a substantial  
14 or motivating factor in the City's determination to discharge her.  
15 The burden then shifts to the City to show that it would have  
16 terminated her, absent her protected activity.

17 There was substantial evidence to demonstrate that Carlson's  
18 union activity was a motivating factor in her discharge, after  
19 consideration of Carlson's entire work history.

20 Carlson was a union steward with the AFSOME from October, 1977  
21 until May, 1979. As a steward, she filed several grievances on behalf  
22 of herself and other employees. After filing a grievance against her  
23 supervisor, she was asked by the City Administrator why she filed so  
24 many grievances, whether she liked her job, and why she did not seek  
25 employment elsewhere. After the supervisor had been fired, he told  
26 a fellow union member that he should have fired Carlson.

27 In April of 1979, an unscheduled performance evaluation  
28 was conducted on animal shelter employees. Carlson was told that  
29 the evaluation would not be placed in her personnel file; she later  
30 learned that it had been placed in her file. After objecting, she  
31 returned to the personnel office and the evaluation had been removed,  
32 and she filed a grievance on that matter.

1 On September 25, 1979, Carlson received a performance  
2 evaluation which rated her as an average employee and resulted in her  
3 merit pay increase.

4 On February 2, 1980, Carlson represented her department  
5 during the bargaining between the Teamsters and the City of Billings.  
6 She openly discussed problems that she felt existed at the Shelter.  
7 Following that meeting, her supervisor orally reprimanded her for the  
8 statements she made at the meeting.

9 After the February 2 meeting, Carlson was required to drive  
10 Truck 1085, a truck that she had complained about at the bargaining  
11 meeting, despite the fact that she had not been required to drive it  
12 during the previous two years. On February 11, 1980, Carlson was  
13 reprimanded for operating a truck without a tachometer, although this  
14 was a common practice for the employees.

15 On March 10, 1980, Carlson was terminated by her supervisor  
16 for insubordination and lack of cooperation.

17 There is substantial evidence in the record to support the  
18 conclusion that Carlson clearly carried her burden of establishing  
19 a prima facie case that her protected union activity was a motivating  
20 factor in her dismissal.

21 The burden then shifted to the employer, to establish that  
22 it would have taken the same action regardless of Carlson's protected  
23 conduct. Upon consideration of Carlson's entire work history with  
24 the City, the City has failed to carry its burden.

25 On May 11, 1979, Carlson's vehicle was struck from the  
26 rear by another. Carlson used intemperate language in describing the  
27 accident over the radio. Also during May, she was reprimanded for  
28 having a rider in the van. During June of 1979, Carlson picked up  
29 the wrong dog after a postman had been bitten by a dog. During this  
30 course of events, Carlson conducted herself in an improper manner  
31 and received a letter so advising from her supervisor.

32 On September 14, 1979, Carlson did damage to an animal

shelter vehicle while backing it out of the garage.

In late December of 1979, there was an incident involving Carlson's alleged refusal to go home on sick leave, after being ordered to do so. She was suspended for four days without pay, and given a written reprimand for insubordination for this incident. There was considerable confusion over this incident and whose fault it was. There was no grievance procedure in effect at the time and there is evidence to support the hearing officer's determination that the incident was nothing more than an attempt by Carlson to work after she had been belatedly adjudged sick by Larson, her supervisor.

In March of 1980, the incident involving Carlson and the schnauzer dog occurred. Carlson had picked up a dog she believed to belong to a friend and took it to her home because the friend was in the hospital. A Mrs. Wertz came to the animal shelter looking for her schnauzer dog and Carlson told her that she had picked up a schnauzer dog and Carlson told her that she had picked up a schnauzer, but had returned it to its owner. Wertz called Carlson's supervisor and told him that she was convinced that the dog was being kept from her. Carlson and her supervisor then went to her friend's house. The friend told the supervisor that he did not have the schnauzer anymore. Carlson then stated that the dog was at her house. She initially refused to take her supervisor there, but later did, after being ordered to do so by the Assistant Chief of Police. Although the dog was eventually returned to Mrs. Wertz, there was still some question as to the ownership of the dog.

It appears that Carlson received unequal treatment concerning some of the incidences for which she was reprimanded. It further appears that some of the reprimands received by Carlson were the result of union animus. As such, these reasons could not be considered to show that the City would have terminated Carlson absent her protected activity. Other reprimands resulted from poor communication. City officials testified that employees are very rarely

1 discharged. Carlson did receive a merit pay increase based upon  
2 an average to above average evaluation, in September of 1979. The  
3 City did not introduce evidence as to its practice of firing an  
4 employee in a situation comparable to the facts presented here.


5 There is substantial evidence to support the conclusion  
6 that the City did not carry its burden of showing that it would have  
7 terminated Carlson absent her protected union activity.

8 The City of Billings objects that the Board of Personnel  
9 Appeals did not take additional evidence after the remand of this  
10 matter from the Supreme Court. It appears that there is no motion  
11 in the administrative record requesting that additional evidence be  
12 taken. The City did file a motion for an order directing that  
13 additional evidence be taken before this Court on May 6, 1983. The  
14 City has been given substantial opportunity to introduce all of the  
15 evidence it wished before the administrative agency. The agency has  
16 considered the evidence prior to the merit pay increase given Carlson  
17 and such evidence was already in the record. Therefore, the Court  
18 will not order that additional evidence be taken in this case.

19 Based upon the foregoing, the Court now enters the  
20 following ORDER:

21 The decision of the Board of Personnel Appeals is supported  
22 by substantial evidence on the whole record and there has been no  
23 error of law warranting reversal under the standards of review of the  
24 Montana Administrative Procedure Act, Section 2-4-704(2) MCA. The  
25 decision of the agency ordering reinstatement of Susan Carlson and  
26 full back pay is hereby AFFIRMED.

27 DATED this 7 day of July, 1985.

28  
29  
30   
WILLIAM J. SPEARE, District Judge

31 CERTIFICATE OF SERVICE

32 This is to certify that this finding  
was duly served upon the  
parties at their last known address  
at their last known address this

9 day of February,  
1985

By M. M. M. M.

By M. M. M. M.

cc: K. D. Peterson  
James Gardner  
Emily Loring

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Attorneys for Chauffeurs, Teamsters and Helpers  
Local Union No. 190, Petitioner

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE  
STATE OF MONTANA, IN AND FOR THE COUNTY OF YELLOWSTONE

CITY OF BILLINGS, a Montana Municipal Corporation,	Petitioner,	No. DV-83-469
-vs-		
STATE OF MONTANA BOARD OF PERSONNEL appeals and CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 190,	Respondents.	

ANSWER AND COUNTERPETITION FOR ENFORCEMENT

ANSWER

Respondent Chauffeurs, Teamsters and Helpers, Local Union No. 190 (Local 190) submits the following answers to the Petition To Review Final Order of the Board of Personnel Appeals filed by Petitioner:

1. Respondent Local 190 admits the allegations of paragraph 1 of said Petition.
2. Respondent Local 190 denies the allegations of paragraphs 2 and 3 of said Petition.

COUNTERPETITION FOR ENFORCEMENT

1. Respondent Local 190, pursuant to Section 39-31-409, MCA, petitions for enforcement of the Final Order of the Board of Personnel Appeals.
2. Petitioner is the City of Billings, a municipality located in Yellowstone County, Montana.

3. Respondent Board of Personnel Appeals is a quasi-judicial board that has jurisdiction over public employer-employee labor relations pursuant to Title 19, Chapter 31, MCA.

4. Respondent Local 190 is the exclusive bargaining representative for certain employees of the City of Billings, including Sue Carlson.

5. On March 17, 1980, an unfair labor practice charge was filed with Respondent Board of Personnel Appeals by Respondent Local 190 alleging that the Petitioner, City of Billings, had violated Section 39-31-401(1) and (3) MCA by discharging Sue Carlson because of her union activities.

6. A hearing was held on August 6, 1980, by a Hearing Examiner for the Board of Personnel Appeals.

7. On December 22, 1980, the Hearing Examiner issued his Findings of Fact, Conclusions of Law and Recommended Order finding that Sue Carlson was discharged by the City of Billings in violation of Section 39-31-401(1) and (3), MCA. The Recommended Order is attached as Exhibit A.

8. Timely exceptions to the Hearing Examiner's Recommended Order were filed by Petitioner City.

9. Following briefing and oral argument, Respondent Board of Personnel Appeals issued a Final Order on April 14, 1981, upholding the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Examiner, denying the exceptions of the City and adopting the Recommended Order of the Hearing Examiner as its Final Order. That Final Order is attached as Exhibit B.

10. Petitioner City appealed the Board's Final Order in District Court in the Thirteenth Judicial District for the State of Montana, in and for the County of Yellowstone, Cause No. DV-81-1015. The District Court reversed the Board of Personnel Appeals on November 6, 1981.

1 11. Respondent Teamsters Local Union No. 190 appealed the  
2 District Court's Decision to the Montana Supreme Court, Cause No.  
3 81-529.

4 12. The Supreme Court reversed the District Court and re-  
5 manded the matter to the Board of Personnel Appeals with direc-  
6 tions to consider certain matters which the Hearing Examiner had  
7 previously held irrelevant, Chauffeurs, Teamsters and Helpers,  
8 Local Union No. 190 and State of Montana Board of Personnel  
9 Appeals v. City of Billings, 648 P.2d 1167 (1982).

10 13. The Hearing Examiner did as instructed by the Supreme  
11 Court and issued his Amended Recommended Order on December 13,  
12 1982, giving due consideration to the matters considered relevant  
13 by the Supreme Court and again finding that Sue Carlson had been  
14 discriminatorily discharged in violation of Section 39-31-401(1)  
15 and (3).

16 14. Petitioner City again filed exceptions to the Board of  
17 Personnel Appeals. Both parties were provided the opportunity to  
18 submit briefs to the Board, although only Respondent Teamsters  
19 Local Union No. 190 did so. On January 21, 1983 both parties  
20 participated in oral argument before the Board and the Board  
21 again decided to adopt the Recommended Order as its Final Order.  
22 The Recommended Order and Final Order are attached as Exhibits C  
23 and D.

24 15. The Final Order of the Board of Personnel Appeals is  
25 supported by substantial evidence and correctly decides issues of  
26 law.

27 WHEREFORE, Respondent Teamsters Local Union No. 190 prays as  
28 follows:

29 1. That the District Court uphold the Final Order of the  
30 Board of Personnel Appeals.

31 2. That the District Court issue an order requiring the City  
32 of Billings to comply with the Final Order of the Board of Per-  
sonnel Appeals.

1           3. That the District Court provide such further relief as it  
2       deems appropriate and just.

3       Dated this 21<sup>st</sup> day of March, 1983.

4                   HILLEY & LORING, P.C.,

5       By: Emilie Loring  
6           Attorneys for Chauffeurs, Teamsters  
7           and Helpers, Local Union No. 190

8  
9  
10                   CERTIFICATE OF SERVICE BY MAIL

11       THIS IS TO CERTIFY that on the 21<sup>st</sup> day of March, 1983 a  
12       true and exact copy of the foregoing Answer and Counterpetition  
13       for Enforcement was mailed, postage prepaid, to:

14                   K. D. PETERSON  
15                   Peterson, Schofield & Leckie  
16                   3906 Third Ave. North  
17                   Billings, Montana 59101

18                   JAMES E. GARDNER, JR.  
19                   Staff Attorney  
20                   Board of Personnel appeals  
21                   Capitol Station  
22                   Helena, Mt 59601

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Emilie Loring



STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 10-80:

CHAUFFEURS, TEAMSTERS AND  
HELPERS, LOCAL UNION NO. 190,

Complainant,

- vs -

CITY OF BILLINGS,

Defendant.

FINAL ORDER

\*\*\*\*\*

The Amended Recommended Order was issued by Hearing Examiner Jack H. Calhoun on December 13, 1982.

Exceptions to the Amended Recommended Order were filed by K.D. Peterson, Attorney for Defendant, on January 3, 1983.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows: 1

1. IT IS ORDERED, that the Exceptions of the Defendant to the Amended Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Amended Recommended Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board, with the typographical corrections of that decision noted below:

- Page 1, line 23 should read October 1, 1979 instead of 1981.

- Page 4, line 29 should read October of 1979 instead of December of 1979.

DATED this 2d day of February, 1983.

BOARD OF PERSONNEL APPEALS

By Joan A. Uda  
Joan A. Uda  
Alternate Chairman

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FILED

EXHIBIT D

BEFORE THE BOARD OF PERSONNEL APPEALS  
IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 10-80:

CHAUFFEURS, TEAMSTERS AND  
HELPERS, LOCAL UNION NO. 190,

Complainant,

vs.

AMENDED  
RECOMMENDED ORDER

CITY OF BILLINGS,

Defendant.

\* \* \* \* \*

This case was remanded from the Montana Supreme Court to the Board of Personnel Appeals on August 5, 1982, for consideration and decision in light of events occurring prior to Susan Carlson's merit increase as well as subsequent happenings. The Board of Personnel Appeals found, by its final order issued on April 4, 1981, that Carlson had been discharged because of her union activities in violation of Section 39-31-401(1) and (3), MCA, and ordered her reinstated with back pay. The District Court of the Thirteenth Judicial District reversed that decision.

The merit increase awarded Carlson on or about October 1, 1981, resulted from an evaluation of her performance as an employee by her immediate supervisor, Darlene Larson. The evaluation encompassed ten areas of concern including cooperation, judgment and dependability. The overall rating of Carlson showed her to be above average in most categories.

I reviewed Carlson's activities as an employee prior to the performance evaluation and concluded that those three occasions during which she performed poorly as an employee should be "ignored" because of the good evaluation. That is to say, since the City's evaluation indicated her conduct as



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2 an employee, especially in the areas of cooperation and  
3 judgment, was better than an average employee, I should  
4 accept that as her status at that point in time. Instead of  
5 ignoring the events prior to the evaluation and merit pay  
6 increase, I should have considered those occasions of poor  
7 performance, along with all other events which occurred  
8 prior and subsequent to the evaluation and increase.

9 Pursuant to the Supreme Court's decision in this case,  
10 the proper events which should have been considered in  
11 determining whether Sue Carlson was lawfully discharged by  
12 the City are those listed below:

- 13  
14 1. From October 1977 until May 1979, when the American  
15 Federation of State, County and Municipal Employees'  
16 union was replaced by the Teamsters union, Sue  
17 Carlson served as a shop steward and filed six  
18 grievances against the City, both on her own behalf  
19 and on behalf of other union members. She was  
20 also a union trustee and a member of the executive  
21 board.
- 22 2. During July 1978 Carlson filed a grievance against  
23 her supervisor, Nixon, because of his harassment of  
24 her. At a meeting later in September the City  
25 decided to "wipe the slate clean."
- 26 3. On October 16, 1978 she filed another grievance  
27 over the harassment because the September meeting  
28 had not resolved anything. Nixon had threatened  
29 to "build a file" on her if she continued to run  
30 to the union. The grievance alleged continued  
31 harassment by Nixon, Captain Alles and Chief of  
32 Police Kiser. The City Administrator directed

2 that Nixon cease harassing her, either directly or  
3 indirectly. Alles and Kiser were not found to be  
4 a part of the harassment. During a meeting on the  
5 grievance with the Administrator, Carlson was  
6 asked by him why she filed so many grievances,  
7 whether she liked her job and why did she not seek  
8 employment elsewhere.

9 4. At various times during her tenure as shop steward,  
10 Carlson was asked by the City Personnel Director,  
11 her supervisor, the Chief of Police, Captain  
12 Sampson and by Sergeant Hall why she did not quit  
13 rather than bucking them.

14 5. During March of 1979 Nixon was fired from his  
15 position. He thereafter went to one of Carlson's  
16 fellow union members and stated that he should  
17 have fired her. The fellow employer reminded him  
18 he, Nixon, did not live up to the contract.

19 6. In April of 1979 Sergeant Hall conducted an unsched-  
20 uled performance evaluation on Animal Shelter  
21 employees. Carlson was told the evaluation would  
22 not be placed in her personnel file, however, she  
23 later learned that it had been placed in her file.  
24 Upon finding it in the file, she went to see Chief  
25 Kiser to object. By the time she returned to the  
26 personnel office the evaluation had been removed  
27 from her file. She filed a grievance on the  
28 matter which was finally resolved to her satis-  
29 faction.

30 7. On May 11, 1979 the City vehicle which Carlson was  
31 driving was hit in the rear by another vehicle.  
32 Carlson used intemperate language in describing

the accident over the radio. Also during May she was warned about taking riders in the van without permission. She was later given a written reprimand for having a rider in the van.

8. During June of 1979 a postman was bitten by a dog. Carlson picked up the wrong dog and took it to the Animal Shelter. During the course of events surrounding the situation Carlson conducted herself in an improper manner toward the people involved in the incident. She later received a letter from her supervisor telling her similar future conduct would result in a written reprimand.

9. On September 14, 1979 Carlson backed a vehicle out of the Animal Shelter garage and did damage to the door. She was given a letter of reprimand, however, four other people who had done the same thing were not reprimanded. The damage Carlson did was repaired at no expense to the City.

10. On September 25, 1979 Carlson received her performance evaluation which resulted in her merit pay increase. Overall the evaluation showed she was an average employee and it showed she was above average in job knowledge, judgment, cooperation and initiative. The comment was noted on the evaluation form that although she let personal problems interfere, she worked well with other employees.

11. During late December of 1979 Carlson gave her supervisors a request signed by her doctor that she be allowed light duty for ten days so that her leg problem would get better. Four days after

2 receiving the request the City gave permission for  
3 her to work light duty. She had worked regular  
4 duty while awaiting permission and continued to  
5 work regular duty after permission to work light  
6 duty was granted. On what would have been the  
7 tenth day, a Friday, she was ordered home for  
8 three days, although she protested that her leg  
9 was better and that she did not have enough sick  
10 leave to cover the time off. Upon being ordered to  
11 use sick leave, Carlson talked to Captain Alles  
12 who led her to believe she could remain on duty.  
13 When Larson discovered she was still on duty she  
14 had her sent home. On Saturday she obtained a  
15 release from her doctor to return to work. She  
16 then reported for work, but her supervisor said  
17 she could not work. She returned home, but later  
18 went back because her supervisor changed her mind  
19 about her working. On Monday Carlson was sent to  
20 the City's doctor for an examination and was  
21 subsequently released for work. That same day she  
22 was given a written reprimand for insubordination  
23 for refusing to go home when first ordered to do  
24 so and suspended for four days without pay. She  
25 attempted to file a grievance but there was no  
26 extant collective bargaining agreement.

- 27 12. On February 2, 1980 Carlson appeared at a negotia-  
28 ting session between the Teamsters union and the  
29 City to explain and express concerns of Animal  
30 Shelter employees. She complained about equipment  
31 and working conditions in general, but she specifi-  
32 cally complained about having to go into a trailer

2 alone without police backup for a dog and about  
3 the condition of truck 1085. The next day her  
4 supervisor orally reprimanded her for speaking out  
5 at the meeting.

6 13. After February 2nd Carlson was required periodically  
7 to drive truck 1085, although she had not been  
8 required to drive it during the previous two years  
9 and despite the fact she had brought two doctors'  
10 statements which stated she should not drive it  
11 because of her back condition.

12 14. On February 11, 1980 Carlson was reprimanded for  
13 operating a truck without a tachometer. It was  
14 common practice for employees to drive trucks on  
15 the weekend without tachometers. Carlson was the  
16 only one who was admonished.

17 15. On March 10, 1980 Carlson was terminated by her  
18 supervisor for insubordination and lack of cooper-  
19 ation related to events the previous week concerning  
20 a Schnauzer dog.

21 On Wednesday, March 5, 1980 a Mrs. Wertz had gone  
22 to the Animal Shelter looking for her male Schnauzer  
23 dog which had been missing since the previous  
24 Monday. She had been told by her postman that he  
25 saw two Animal Wardens load her dog and a black  
26 Labrador into their van. On the previous Monday,  
27 March 3, 1980 Carlson and another Animal Warden,  
28 Dick Olson, had picked up the two dogs while on  
29 routine patrol. Carlson believed the Schnauzer to  
30 be the same dog she had given to her friend, Bill  
31 Ostwald, earlier in January and for that reason  
32 did not log the dog in when they returned to the

Animal Shelter. It was customary to return dogs to their owners when a Warden knew to whom they belonged, instead of logging them in at the Animal Shelter. Instead she took it to Oswald's brother (Ostwald was in the hospital). When Ostwald got out of the hospital he asked Carlson if she would keep the dog for him; he did not feel up to it at that time. She agreed to do so. On March 5, 1980, prior to Ostwald's release from the hospital and while the dog was at his brother's place, Larson called Carlson on her day off and asked if she had picked up a male Schnauzer. Carlson said she had and it had been returned to the owner. Returning dogs to their owners in this manner was standard, accepted procedure at the Animal Shelter. On Friday, March 7, 1980 Carlson returned to duty. Shortly after her return, Mrs. Wertz called the Animal Shelter from Bill Ostwald's home where she had gone looking for her dog and where she had come to believe the dog was being hidden from her. Mrs. Wertz was upset and was urged by Larson to call back after the matter was investigated. After Mrs. Wertz left Ostwald's place, he called Carlson at the Animal Shelter and told her about the situation. Carlson and Larson drove out to Ostwald's place. On the way Carlson asked Larson if she could speak privately with Ostwald when they first arrived. Larson denied her request. Upon arrival Larson asked Ostwald if Carlson had brought him a Schnauzer. He said she had not. Carlson then remarked, "You don't have to lie."



2 "This is my boss, you can tell the truth." He  
3 continued to say he did not have the Schnauzer and  
4 had not seen it. Upon re-urging by Carlson, he  
5 finally admitted that she brought him a dog, but  
6 that he did not have it anymore, in fact, never  
7 really did keep the dog. He gave them some regi-  
8 stration papers on a male Schnauzer which Carlson  
9 had given him previously. Larson asked if those  
10 were the papers for the dog he had. He believed  
11 they were. When asked where the dog was, he said  
12 it was in Shepherd. Larson asked to go see it.  
13 Carlson said the people were not home, they were  
14 at work. On further questioning she said she had  
15 the dog at her own home. As they were leaving  
16 Oswald's place Mrs. Wertz showed up again and  
17 became very upset with Carlson. She wanted to go  
18 with Carlson and Larson to see the dog. Carlson  
19 refused to take them to her property because she  
20 did not want anyone to know where she lived. She  
21 offered to go get the dog and bring it back. Mrs.  
22 Wertz then decided they (she and Carlson) should  
23 go to the Police Department. At the police station  
24 the Assistant Chief gave Carlson the chance to get  
25 the dog accompanied by Larson. Together they  
26 retrieved the dog and took it to the Animal Shelter  
27 where they encountered Mrs. Wertz along with her  
28 friends and neighbors who were there to identify  
29 the dog. Carlson had also gathered people to  
30 identify the dog as Oswald's. In the confusion  
31 the dog did not know who its master was, nor were  
32 the people able to tell to whom it belonged. Mrs.

1 Wertz and Larson took the dog to her veterinarian  
2 who informed them that it fit the age stated on  
3 Mrs. Wertz' papers and that the ear clipping was  
4 his work - work he had performed on her dog. When  
5 they returned to the Animal Shelter a former owner  
6 of the dog Ostwald was missing claimed the dog in  
7 question belonged to Ostwald. Carlson then decided  
8 to give the dog to Mrs. Wertz because Ostwald did  
9 not want it. Carlson finished her shift that day.  
10 She went to work the following day, Saturday, and  
11 was told by Larson she ~~was~~<sup>is</sup> suspended with pay  
12 pending an investigation. The following week she  
13 received a letter of termination.

14  
15 An examination of the above events shows that from the  
16 time Carlson began her employment at the Animal Shelter in  
17 October of 1977 until May of 1979 there was not one occasion  
18 of poor performance on her part. During that period she  
19 did, however, pursue her activities as a union officer in a  
20 diligent manner which, according to the City Administrator  
21 and other City officers caused the City an amount of dissatis-  
22 faction with her. After May of 1979 she did, without question,  
23 falter as an employee and engaged in conduct which could be  
24 described as thoughtless reactions to particular situations.  
25 Given those occurrences and nothing more one could reasonably  
26 conclude that Carlson needed to be reprimanded and counseled  
27 on what the City's expectations of her were. However, there  
28 were extenuating circumstances. She had endured 18 months  
29 of harassment and grievous conduct by City supervisors and  
30 management personnel for pursuing union activities; she was  
31 involved in a divorce, which Larson noted on her evaluation;  
32 and she had no means of redress for the reprimands because

1  
2 there existed no grievance procedure during the time the  
3 Teamsters Union was in the process of taking over the bargaining  
4 unit. The incident when her supervisor made her go home in  
5 spite of her protest that her leg was better is an example  
6 of the latter proposition, it amounted to nothing more than  
7 an attempt by Carlson to work after she had been belatedly  
8 adjudged sick by Larson.

9 When the City, through its supervisor Larson and Police  
10 Chief Kiser, evaluated Carlson's performance as an employee,  
11 they evidently attached little or no importance to aspects  
12 of her employment during the preceding months because they  
13 gave her an above average rating -- they specifically rated  
14 her high in cooperation, judgment, initiative, knowledge of  
15 the job and rate of progress. The high rating case, it must  
16 be remembered, within a few months of Carlson's misconduct  
17 involving the use of intemperate language after the automobile  
18 accident and the incident with the bitten postman. Although  
19 a good evaluation and merit increase cannot excuse subsequent  
20 misconduct, it seems clear that it should serve as an indication  
21 of the lack of seriousness that the City attached to the  
22 prior conduct. In the instant case the two above-mentioned  
23 matters could not have been serious matters to the City,  
24 otherwise Larson and Kiser would have made note of them and  
25 evaluated her accordingly. They obviously did not serve to  
26 deny her a merit raise.

27 The two cases cited by the City as holding that a  
28 satisfactory performance rating does not erase prior disci-  
29 plinary actions, Rockland-Barnberg Print Works, Inc., (1977),  
30 231 NLRB 305, 96 LRM 1237 and Concrete Technology, Inc.,  
31 (1975) 224 NLRB 961, 93 LRM 1282, do not so hold. Rockland-  
32 Barnberg held that a satisfactory performance rating before

1 the election (union activity) cannot give rise to an infer-  
2 ence that a discharge five months later for unsatisfactory  
3 performance was motivated by the union activity. Here, the  
4 misconduct (which the Supreme Court said must be considered)  
5 occurred prior to the satisfactory rating. In Concrete  
6 Technology the holding was that it is immaterial that the  
7 employee received a wage increase shortly before his discharge  
8 because the discharge was based on a single incident rather  
9 than on an evaluation of his overall work performance.  
10 Carlson was not terminated over a single incident. Her  
11 discharge was stated as being for noncooperation with Larson  
12 and other employees over a period of time. Yet, Larson  
13 rated her high on cooperation on the performance evaluation.  
14 After the evaluation and merit increase there was not one  
15 incident of unjustified lack of cooperation on the part of  
16 Carlson. The "leg incident" in December of 1979 reflects  
17 negatively on Larson's supervisory ability, not on Carlson's  
18 willingness to perform as an employee. The "Schmauer  
19 incident" evinced an overreaction by the City to a minor  
20 mistake - if indeed it can be termed a mistake, inasmuch as  
21 it was never clear to whom the dog belonged.

22  
23 What the NLRB cases do hold is that a prior good record  
24 or merit increases serve to indicate, along with other  
25 factors, either inconsistency on the part of the employer or  
26 that the disciplinary action was in retaliation for union  
27 activities rather than for the reason asserted by the employer.  
28 In NLRB v. Evans Packing Co. (6th Cir. 1972), 463 F.2d 193,  
29 80 LRRM 2810, the court upheld an NLRB decision to reinstate  
30 an employee who had been discharged in violation of Section  
31 8(a)(1) of the National Labor Relations Act. There, the  
32 employee, after having been involved in protected activity;

2 had been in a fight on company premises 15 months before his  
3 discharge; had been reprimanded two or three months prior to  
4 his discharge for spending too much time in the locker room;  
5 was repeatedly late; was absent without an excuse several  
6 times; and had a drinking problem, was nonetheless reinstated  
7 because he had been given several merit increases and was a  
8 good employee when he wanted to be. The court concluded  
9 from those circumstances that the reasons advanced by the  
10 employer for the termination was not the true reason, that  
11 his union activities were the reason. See also NLRB v. Charles  
12 H. McCauley Associates, Inc., (5th Cir. 1981) 657 F2d 685,  
13 108 LRRM 2612; Dragage Electric Co., Inc., 1974, 214 NLRB  
14 847, 88 LRRM 1312.

15 After reviewing the events which occurred prior to  
16 Carlson's merit increase as well as subsequent happenings, I  
17 must conclude the City had a permissible and an impermis-  
18 sible reason to discipline her. The totality of her conduct  
19 as an employee provided the City with cause to invoke some  
20 disciplinary action; however, her union activities also  
21 caused the City to want to get rid of her as is evidenced by  
22 the comments made by the former City Administrator and other  
23 City officers about her union activities. And, the City's  
24 antiunion animus is further evidenced by the removal of the  
25 evaluation from her file, the adverse reaction by Larson to  
26 Carlson's statements about truck 1085 at the February union  
27 meeting with management, in thereafter making her drive  
28 truck 1085 and in interviewing her, and her only, because of  
29 the tachograph record, the overreaction by management personnel  
30 to the Schnauzer episode and finally the Personnel Director's  
31 comments. All the events taken together compel the con-  
32 clusion that antiunion animus was definitely a motivating

2 factor in the City's decision to terminate Carlson. The  
3 City's failure to come forth and prove that it would have  
4 terminated her for any of the individual events or that it  
5 would have done so on the basis of all alleged acts of  
6 misconduct taken together shows the City would not have  
7 terminated her but for her union activities. I use the word  
8 "alleged" to describe the events, exclusive of the Schnauzer  
9 dog incident, because: (1) she did not have a chance to  
10 aggrieve then because there was no collective bargaining  
11 agreement in existence, and (2) I have found that the earlier  
12 incidents show hostility toward Carlson because of her union  
13 activities or they show disparate treatment because of her  
14 union activities. See Board of Trustees Billings School  
15 District No. 2 vs. State of Montana ex rel Board of Personnel  
16 Appeals and Billings Education Association, \_\_\_\_\_ Mont.  
17 \_\_\_\_\_, 604 P.2d 770 (1979), Bruce Young, et al. vs. City of  
18 Great Falls, 39 St. Repr. 1047. Had she not been a union  
19 activist who filed grievances for herself and others and who  
20 spoke up for her own concerns to management, she would still  
21 be employed by the City -- perhaps as Senior Warden as  
22 Larson indicated on Carlson's evaluation form in which Chief  
23 Kiser concurred. It cannot be seriously asserted that the  
24 City applied its usual rules and disciplinary standards to  
25 Carlson just as it would have to a nonactivist because there  
26 is no evidence to support such an assertion. NLRB v. Wright Line,  
27 (1st Cir. 1981) 108 LHRM 2513. After counsel for Carlson  
28 showed that her protected conduct was a factor in the discharge,  
29 the City had the opportunity to show it would have reached  
30 the same decision even in the absence of the union activity;  
31 it simply did not do so. In the absence of such evidence  
32 and despite the conduct prior to and subsequent to the

1  
2 performance evaluation and merit pay increase, I must conclude  
3 that Carlson's dismissal was motivated substantially by her  
4 union activities.

5 Susan Carlson was discharged by the City of Billings in  
6 violation of 39-31-401(1) and (3), MCA.

7 RECOMMENDED ORDER

8 IT IS ORDERED that the final order issued by this Board  
9 on April 4, 1981, be affirmed.

10 Exceptions to this amended order may be filed within  
11 twenty days of service. If no exceptions are filed, the  
12 amended order shall become the final order of the Board of  
13 Personnel Appeals. Address exceptions to Board of Personnel  
14 Appeals, Capitol Station, Helena, Montana, 59620.

15 Dated this 13th day of December, 1982.

16  
17 BOARD OF PERSONNEL APPEALS

18  
19 BY: Jack H. Calhoun

20 Jack H. Calhoun  
21 Hearing Examiner

22 \* \* \* \* \*

23 CERTIFICATE OF MAILING

24 The undersigned does certify that a true and correct  
25 copy of this document was mailed to the following on the  
26 13<sup>th</sup> day of December, 1982.

27 Kenneth D. Peterson  
28 City Attorney  
29 Suite 250, The Grand  
30 27 Street & First Avenue North  
31 Billings, Montana 59101

32 Emilie Loring  
Hilley & Loring, P.C.  
121 Fourth Street North  
Suite 20  
Great Falls, Montana 59401

Jennifer Jacobson

BPA1:cwg

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 10-86;

CHAMPERNA, FLAMMERS, AND  
HELPERS, LOCAL UNION NO. 100,

Complainant,

CITY OF BILLINGS,

Defendant.

FINAL ORDER

\*\*\*\*\*

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on December 22, 1980.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by K. D. Peterson, Attorney for Defendant, City of Billings, on January 9, 1981.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendants to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board.

DATED this 24 day of April.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy, Chairman

cc: K.D. Peterson  
Billie Loring

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1 5. Carlson filed a grievance alleging several issues  
2 of harassment by her supervisor, Jim Nixon, in July of 1978.  
3 On September 29, 1978 Carlson, Nixon, and Art Trenk, the  
4 President of the local, had a meeting with the Chief of  
5 Police, Kiser. It was decided that the "slate would be  
6 wiped clean." Letters were to be removed from her file, all  
7 references to earlier charges were to be destroyed and a  
8 letter of apology was to be written by Nixon to Carlson.  
9 Later on, after Nixon was fired and during the interim of  
10 the Teamster takeover, Carlson attempted to file grievances,  
11 however, no procedure had been established at that time to  
12 accommodate the filing of grievances. The Teamster representa-  
13 tive told her that all grievances involving a difference of  
14 opinion with the City would be handled after a procedure had  
15 been negotiated.

16 6. On October 16, 1978 Carlson filed another grievance  
17 alleging many of the same problems which were purported to  
18 have been solved at the meeting with the Chief on September  
19 29th. It also alleged that the Chief and Captain Alles were  
20 not dealing with the harassment. The grievance was processed  
21 through the procedural steps and ended when the City Administrator  
22 directed that "no further elements of harassment, direct or  
23 indirect, be undertaken by Mr. Nixon toward Susan Carlson..."  
24 No harassment was found to have been engaged in by Chief  
25 Kiser or Captain Alles. Upon first receiving the grievance,  
26 Nixon told Carlson that if she continued to run to the union  
27 he would have a "thick file" on her and she would be fired.  
28 During their meeting, the City Administrator, asked Carlson  
29 if she liked her job, why she filed so many grievances,  
30 and further, why she didn't go elsewhere for a job.  
31  
32

1 7. Nixon was forced to resign in March of 1979. For  
2 three weeks following Nixon's termination Sgt. Hall was in  
3 charge of the Animal Shelter. Darlene Larson came on as  
4 Superintendent in April of 1979. During the first several  
5 days of Larson's tenure Sgt. Hall decided to complete a  
6 performance evaluation of each Animal Shelter employee.  
7 Carlson objected to the unscheduled evaluation and walked  
8 out of her session with Hall and Larson informing them she  
9 would attend with a union representative present. The  
10 evaluation was done later. Carlson was told the evaluation  
11 would not be put in her personnel file. She was later  
12 informed that it had indeed been placed in her file. She  
13 and Dennis Mueller, the Union President, went to City Hall  
14 and found the evaluation in her file. They then went to see  
15 the Chief of Police to object. By the time they returned to  
16 the personnel office the evaluation had been removed from  
17 the file. Carlson filed a grievance against Larson and Hall  
18 over the matter. It was ultimately resolved to her satisfaction.

19 8. After Nixon's termination, he visited with Art  
20 Trenk, a City employee for 17 years and the AFSCME President  
21 during the period involving Carlson's harassment grievance,  
22 and asked questions about Sue Carlson. He, Nixon, said she  
23 was the source of his problem and that he should have fired  
24 her. Trenk told him he did not live up to the contract.

25 9. On May 11, 1979 the City vehicle which Carlson was  
26 driving was hit from the rear by another vehicle. She  
27 reported over the radio that "someone has just ass-ended  
28 this truck." Larson told her that was inappropriate.  
29 During the same month Larson warned her about taking riders  
30 in the van without permission. Later, on October 22, 1979,  
31 Larson issued a written reprimand to her for having a rider  
32 in the van. On the particular occasion Carlson had encountered

1 a child-care problem and found it necessary to transport her  
2 daughter to the animal shelter to await the child's father.

3 10. During early June of 1979 an incident occurred  
4 wherein a postman was bitten by a dog. Carlson picked up a  
5 dog, which she thought had done the biting, and took it to  
6 the Animal Shelter. It later was determined that the dog  
7 which she picked up was not the one which bit the postman.  
8 However, Carlson, in the meantime, conducted herself in an  
9 improper manner toward the people involved in the incident.  
10 She received a letter from Larson dated June 5, 1979 concerning  
11 the matter, it reads, in pertinent part, as follows:

12 ...The situation jeopardized the public relations at the  
13 shelter and the relations between co employees and  
14 caused a good deal of anguish for the owner of the dog  
15 who was not the one that did the biting in the first  
16 place.

17 Telling a fellow employee to "shut up" in front of  
18 people at the shelter even though you were speaking to  
19 me on the phone, shows a lack of cooperation as does  
20 throwing papers around the office.

21 ...In the future any verbal abuse, profanity, or non  
22 cooperation will have to be handled with a written  
23 reprimand in your file.

24 11. On September 14, 1979 Carlson backed a van out of  
25 the garage area of the Animal Shelter with the door open.  
26 The door caught on the edge of the building and did minor  
27 damage to the vehicle. The door was repaired at no expense  
28 to the City. Upon advice of a union representative she did  
29 not attend the Accident Review Board meeting on the matter.  
30 On November 21, 1979 she received a letter from the Assistant  
31 Chief of Police informing her the accident had been ruled as  
32 chargeable to her and that the Review Board had recommended  
a letter of reprimand be placed in her file for one year.  
Other Animal Wardens have received similar letters when they  
had vehicle accidents.

12. On September 25, 1979 Larson completed a performance  
evaluation form on Carlson. The purpose of the evaluation

was to determine whether she would receive a merit increase. She did in fact receive the merit increase. The evaluation form itself showed that, on a scale from one to ten, Larson gave her the following ratings:

A.	Quality of Work	-	5
B.	Quantity of Work	-	5
C.	Knowledge of Job	-	6
D.	Dependability	-	5
E.	Judgement	-	6
F.	Cooperation	-	6
G.	Initiative	-	6
H.	Safety	-	4
I.	Health	-	5
J.	Rate of Progress	-	7

Beside a heading on the evaluation form entitled "Supervisory Comments" Larson wrote "at times she lets personal problems interfere with work. Works well with other employees at shelter." The form was signed by Chief Kiser on September 28, 1979. It contained the initials "SC" under a date of October 29, 1979. The "personal problems" referred to the divorce in which Carlson was involved. None of the above-noted ratings are below the requirements of the job. In response to the question "What position do you think is most possible for this employee's next assignment?" Larson wrote "Senior Warden."

13. During late October of 1979 Carlson had a problem with her leg. She obtained a doctor's statement saying she should have light duty for ten days. By the time her supervisors decided to allow her light duty she was feeling better and went about her regular duties. Occasionally she went in the

1 office and raised her leg to rest it. After checking with  
2 Carlson's doctor, the City's doctor and Captain Alles,  
3 Larson decided to order Carlson to go home on sick leave.  
4 Upon being ordered to use sick leave, Carlson talked to  
5 Captain Alles who led her to believe she could remain on  
6 duty. When Larson discovered she was still on duty she had  
7 her sent home. The following morning, Saturday, October  
8 27, 1979, Carlson had a statement from her doctor saying she  
9 could work her regular duties. Larson said she would allow  
10 her to work pending her visit to the City's doctor on Monday.  
11 On Monday, Carlson was suspended without pay for four days.  
12 The letter of suspension was dated October 29, 1979 and  
13 read, in part, " Because of insubordination and failure to  
14 obey direct orders given by me, my supervisor Captain Alles,  
15 and his supervisor Assistant Chief Sampson on Friday (sic)  
16 October 25, you are receiving a four working day suspension  
17 with no pay effective October 29 to commence immediately  
18 following your appointment with the City Physician... Any  
19 further violations will result in immediate dismissal."  
20 Carlson attempted to file a grievance over the suspension;  
21 however, at that time the Teamster's Union, which had decertified  
22 AFSCME, and the City did not have a grievance procedure  
23 negotiated into a contract. The Teamster representative  
24 advised her that those kind of grievances would be handled  
25 after the contract was settled.

26 14. On February 2, 1980 Carlson appeared at a negotiating  
27 session between the Teamsters and the City to explain and  
28 express concerns of employees of the Animal Shelter. She  
29 complained generally about equipment and conditions; she  
30 specifically complained about having to go into a trailer  
31 alone without police backup for a dog and about the condition  
32 of truck 1085. Larson told her the next day she should not  
have said what she did, that her facts were wrong.

1 15. After February 2, 1980 Carlson was required periodically  
2 to drive truck 1085, although she had not been required to  
3 drive it for the previous two years and despite the fact  
4 that she had brought two doctors statements saying that she  
5 should not drive it because it caused her to have back pain.  
6 Carlson had injured her back two years earlier when she  
7 slipped on ice. The seating in 1085 bothered her back  
8 because of its cushioning.

9 16. On February 11, 1980 Larson held an interview with  
10 Carlson regarding tachograph record keeping and activity  
11 sheets. The form used to record the interview was entitled  
12 "Billings Local Office Corrective Interview" and noted that  
13 "tachs and sheets to be turned in daily or shift day following  
14 tour of duty." Carlson, as did other persons at the Animal  
15 Shelter, operated vehicles without a tachometer when they  
16 were not readily available in the usual place of storage.  
17 Carlson was talked to about it, the others were not.

18 17. On March 10, 1980 Carlson was terminated by means  
19 of a memorandum from Larson, concurred in by the Chief of  
20 Police, to her stating, in pertinent part, as follows:

21 Due to insubordination and non-cooperation with  
22 your supervisors on incidences (sic) relating to  
23 events the week of March 3 to March 8, you are  
24 hereby terminated as of today.

25 You were not cooperative in being truthful with me  
26 as to the whereabouts of a male schnauzer captured  
27 by you while on duty, March 3, nor in my efforts  
28 to clear the situation with a public citizen's  
29 suspicions of the shelter and you concerning the  
30 dog.

31 You have been previously warned on more than one  
32 occasion about cooperating with other city employees.

33 18. On Wednesday, March 5, 1980 a Mrs. Wertz had gone  
34 to the Animal Shelter looking for her male Schnauzer dog  
35 which had been missing since the previous Monday. She had  
36 been told by her postman that he saw two Animal Wardens load  
37 her dog and a black Labrador into their van. On the previous

1 Monday, March 3, 1980 Carlson and another Animal Warden,  
2 Dick Olson, had picked up the two dogs while on routine  
3 patrol. Carlson believed the Schnauzer to be the same dog  
4 she had given to her friend, Bill Ostwald, earlier in January  
5 and for that reason did not log the dog in when they returned  
6 to the Animal Shelter. Instead she took it to Ostwald's  
7 brother (Ostwald was in the hospital). When Ostwald got out  
8 of the hospital he asked Carlson if she would keep the dog  
9 for him; he did not feel up to it at that time. She agreed  
10 to do so. On March 6, 1980, prior to Ostwald's release from  
11 the hospital and while the dog was at his brother's place,  
12 Larson called Carlson on her day off and asked if she had  
13 picked up a male Schnauzer. Carlson said she had and it had  
14 been returned to the owner. Returning dogs to their owners  
15 in this manner was standard, accepted procedure at the  
16 animal shelter.

17 19. On Friday, March 7, 1980 Carlson returned to duty.  
18 Shortly after her return, Mrs. Wertz called the Animal  
19 Shelter from Bill Ostwald's home where she had gone looking  
20 for her dog and where she had come to believe the dog was  
21 being hidden from her. Mrs. Wertz was upset and was urged  
22 by Larson to call back after the matter was investigated.  
23 After Mrs. Wertz left Ostwald's place, he called Carlson at  
24 the Animal Shelter and told her about the situation. Carlson  
25 and Larson drove out to Ostwald's place. On the way Carlson  
26 asked Larson if she could speak privately with Ostwald when  
27 they first arrived. Larson denied her request. Upon arrival  
28 Larson asked Ostwald if Carlson had brought him a Schnauzer.  
29 He said she had not. Carlson then remarked, "You don't have  
30 to lie." "This is my boss, you can tell the truth." He  
31 continued to say he did not have the Schnauzer and had not  
32 seen it. Upon re-urging by Carlson, he finally admitted that



1 she brought him a dog, but that he did not have it anymore,  
2 in fact, never really did keep the dog. He gave them some  
3 registration papers on a male Schnauzer which Carlson had  
4 given him previously. Larson asked if those were the  
5 papers for the dog he had. He believed they were. When  
6 asked where the dog was, he said it was in Shepard. Larson  
7 asked to go see it. Carlson said the people were not home,  
8 they were at work. On further questioning she said she had  
9 the dog at her own home. As they were leaving Oswald's  
10 place Mrs. Wertz showed up again and became very upset with  
11 Carlson. She wanted to go with Carlson and Larson to see  
12 the dog. Carlson refused to take them to her property  
13 because she did not want anyone to know where she lived.  
14 She offered to go get the dog and bring it back. Mrs. Wertz  
15 was afraid she would return with a different dog. Larson  
16 then decided they (she and Carlson) should go to the Police  
17 Department. At the police station the Assistant Chief gave  
18 Carlson the chance to get the dog accompanied by Larson.  
19 Together they retrieved the dog and took it to the Animal  
20 Shelter where they encountered Mrs. Wertz along with her  
21 friends and neighbors who were there to identify the dog.  
22 Carlson had also gathered people to identify the dog as  
23 Oswald's. In the confusion the dog did not know who its  
24 master was, nor were the people able to tell to whom it  
25 belonged. Mrs. Wertz and Larson took the dog to her veterinarian  
26 who informed them that it fit the age stated on Mrs. Wertz'  
27 papers and that the ear clipping was his work--work he had  
28 performed on her dog. When they returned to the Animal  
29 Shelter a former owner of the dog Oswald was missing claimed  
30 the dog in question belonged to Oswald. Carlson then  
31 decided to give the dog to Mrs. Wertz because Oswald did  
32 not want it. Carlson finished her shift that day. She went

1 to work the following morning, Saturday, and was told by  
2 Larson she was suspended with pay pending an investigation.  
3 The following week she received the letter of termination.

4 20. Carlson was placed on suspension at the request of  
5 Chief Kiser pending an investigation of criminal charges for  
6 thief. No basis for criminal charges was found.

7 21. Dennis Mueller, who did not participate in the  
8 negotiations between the Teamsters and the City but who did  
9 observe them, on one occasion talked to the City Personnel  
10 Director, Brent Hunter, during a caucus. Hunter told Mueller  
11 they were glad they had finally gotten rid of Carlson. He  
12 mentioned the number of grievances she had filed as being  
13 the basis of the comment.

#### 14 IV. DISCUSSION

15 Section 39-31-401(1) MCA makes it an unfair labor  
16 practice for a public employer to interfere with, restrain,  
17 or coerce employees who exercise their rights under 39-31-201  
18 MCA. Section 39-31-401 (3) MCA, prohibits discrimination by a  
19 public employer "in regard to hire or tenure of employment  
20 or any term or condition of employment to encourage or  
21 discourage membership in any labor organization." The same  
22 prohibition is found in Section 8 (a)(3) of the National  
23 Labor Relations Act. Because of the similar language of the  
24 two acts, the Board of Personnel Appeals has looked to  
25 National Labor Relations Board precedent for guidance in  
26 this and other areas of labor law. In addition to NLRB  
27 cases we have the Montana Supreme Court's ruling in Board  
28 of Trustees Billings School District No. 2 vs. State of  
29 Montana ex rel Board of Personnel Appeals and Billings  
30 Education Association, \_\_\_\_\_ Mont. \_\_\_\_\_, 604 P.2d 770  
31 (1979). There the Court held that the "but for" test used  
32 by the U.S. Supreme Court in Mt. Healthy City School District



1 vs. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), was adopted  
2 for dual motivation cases under Montana's Collective Bargaining  
3 Act. The Court went on to say "... The task of determining  
4 motivation is not easy, and agencies and courts must rely on  
5 the outward manifestations of the employer's subjective  
6 intent. The task is compounded in employment cases where  
7 there exist permissible and impermissible reasons for a  
8 particular discharge. This is a problem of dual motivation."

9 Dual motivation cases should be distinguished from the  
10 so-called pretext cases where the reasons advanced by the  
11 employer to explain a contested discharge were not the real  
12 reasons for the termination; where the purported good cause  
13 was merely a smokescreen. In dual motivation cases the  
14 discharged employee is said to have provided the employer  
15 with some cause for disciplinary action. At the same time,  
16 however, the evidence indicates the employer also had a  
17 discriminatory reason for making the discharge. The task  
18 then is to determine whether the unlawful reason played any  
19 part in the decision.

20 The NLRB recently attempted to clarify its policy  
21 concerning dual motivation cases and to distinguish between  
22 those cases and pretext cases. With respect to pretext  
23 cases the NLRB, in Wright Line, 251 NLRB 150, 105 LRRM 1169  
24 (1980), stated:

25 "... In modern day labor relations, an employer  
26 will rarely, if ever, baldly assert that it has  
27 disciplined an employee because it detests unions  
28 or will not tolerate employees engaging in union  
29 or other protected activities. Instead, it will  
30 generally advance what it asserts to be a legitimate  
31 business reason for its action. Examination of  
32 the evidence may reveal, however, that the asserted  
justification is a sham in that the purported rule  
or circumstances advanced by the employer did not  
exist, or was not, in fact, relied upon. When  
this occurs the reason advanced by the employer  
may be termed pretextual. Since no legitimate  
business justification for the discipline exists,  
there is, by strict definition, no dual motive.

1 imposed by the employer is, in fact pretextual, i.e., there  
2 is not a legitimate business justification to be found, a  
3 violation of 39-31-401 (3) MCA may be found without further  
4 testing under the dual motive doctrine. But, where the  
5 reason for imposing the discipline is two-fold, one being a  
6 legitimate business reason, the other being a reaction to  
7 the employee's protected union activities, a true dual  
8 motive situation is presented.

9  
10 In Wright Line, supra, the NLRB, after discussing the  
11 various dual motive doctrines and the manner in which they  
12 had been applied in the past by the Federal Circuit Courts  
13 and the NLRB itself, went on to adopt the same test of causation  
14 used by the U.S. Supreme Court in Mt. Healthy, supra, in  
15 cases dealing with alleged violations of Sections 8(a) (1)  
16 and (3) of the National Labor Relations Act. The test  
17 requires that the employee show that the protected conduct  
18 was a substantial or motivating factor in the employer's  
19 decision to discipline. Once that is done, the burden  
20 shifts to the employer to show it would have reached the  
21 same decision even in the absence of the union activity.  
22 That the Montana Supreme Court adopted the reasoning of  
23 Mt. Healthy earlier has already been noted.

24 The NLRB went on in Wright to explain its rationale in  
25 adopting the Mt. Healthy test:

26 ...Perhaps most important for our purposes, however,  
27 is the fact that the Mt. Healthy procedure accommodates  
28 the legitimate competing interests inherent in  
29 dual motivation cases, while at the same time  
30 serving to effectuate the policies and objectives  
31 of the Act... Under the Mt. Healthy test, the  
32 aggrieved employee is afforded protection since he  
or she is only required initially to show that  
protected activities played a role in the employer's  
decision. Also, the employer is provided with a  
formal framework within which to establish its  
asserted legitimate justification. In this context,  
it is the employer which has "to make the proof."  
Under this analysis, should the employer be able



would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

Finally, with respect to an alleged 39-31-401 (3) MCA violation and the employer's intent, discriminatory conduct motivated by union animus and having the foreseeable effect of either encouraging or discouraging union membership must be held to be in violation of employee rights. The U.S. Supreme Court, in Radio Officers' Union vs. NLRB, 347 U.S. 17, 33 LRRM 2417 (1954), reasoned:

...The language of Section 8 (a) (3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus, this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed... But it is also clear that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of 8 (a) (3)... An employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequences.

The facts in the present case will not support a conclusion that the reason advanced by the City for the discharge was merely pretextual. If all other considerations are disregarded for the moment, it is clear that Carlson had to be ordered home when she had the leg problem and that she later refused to take Larson to her home to get the Schnauzer. Therefore, it may not be said the City had no legitimate business justification. But, concluding the reason given for the discharge (i.e., insubordination and non-cooperation) was

of saying the protected activities<sup>2</sup> did not play a role in the decision. For that reason we must look at the facts as they relate to the two-part test set forth in Mt. Healthy.

The record is replete with evidence of Carlson's union activities. She was a shop steward and union official at one time, she filed numerous grievances against her superiors (and would have filed more had a procedure been negotiated), she insisted on her own rights as an employee and she criticized management policies at a bargaining session. It cannot be denied that she had a history of union activity. Some of that activity was as recent as a couple of months prior to her dismissal. Nor can it be said the City did not know of her union activities. She was known to be a union activist by all her supervisors including the former City Administrator. Comments by City officials regarding their displeasure with Carlson's activities support the conclusion that the City did not like what she was doing.

Carlson, in coming forth with her evidence to show that the decision to discharge was motivated by her union activities, introduced substantial evidence from which such an inference can be drawn. Immediately after she appeared at the February 2, 1980 negotiations her supervisor had critical words about her remarks. A few days after that she gave her a corrective interview about the tachometer, but she did not conduct such an interview with other employees. And, two months after her appearance Carlson was dismissed for refusing to take Larson to her home to get the dog.

All of the events which occurred prior to Carlson's merit increase must be ignored as far as the City's argument in support of its decision is concerned. At the time of the merit increase Carlson was considered to be just that -- an



1 factor shown on the evaluation form she was rated, by the  
2 two persons who later terminated her, above the median.  
3 Whether Carlson's suspension for not taking sick leave while  
4 she had her leg problem occurred after or before her merit  
5 increase is not clear from a review of the record. She  
6 initialled the merit review form on October 29, 1979 and  
7 received a letter suspending her the same day. For sake of  
8 argument and since Larson and Kiser signed the merit form a  
9 month earlier, I will assume the leg incident came after the  
10 merit increase. But even under such an assumption, I cannot  
11 but conclude that Carlson's previous union activities in  
12 filing grievances against superiors and her subsequent  
13 appearance at the Teamster-City negotiating session was a  
14 substantial factor in the City's decision to discharge her.  
15 How else can one explain her suspension with pay pending an  
16 investigation of criminal charges for theft, then her dismissal  
17 for insubordination and non-cooperation when no such charges  
18 were found. Also, the punishment imposed by Larson and  
19 Kiser for Carlson's role in the Schnauzer incident does not  
20 fit the "crime." All she did was refuse, for a while, to  
21 take anyone to her house.  
22

23 It seems that all of Carlson's activities both as a  
24 unionist and as a sometimes-less-than-ideal employee became  
25 a thorn in the sides of certain City supervisory personnel.  
26 For those reasons, I am convinced, they intended to use  
27 whatever situation which availed itself to get rid of her.  
28 She was not without fault, however, the City did not carry  
29 its burden of showing that it would have reached the same  
30 decision as to the dismissal even in the absence of the  
31 protected activity.  
32

2 had a policy of dismissing employees under similar circumstances.  
3 Nor is there anything to show the City has in fact dismissed  
4 employees for like behavior. There is evidence showing  
5 events which occurred after Carlson appeared at the February  
6 bargaining session. She was verbally informed of her supervisor's  
7 displeasure, she was required to drive a vehicle which  
8 bothered her back and she was given a corrective interview  
9 while others were not.

10 There was no explanation of why the City did not withhold  
11 the merit increase if it believed she was not a good employee.  
12 To later come to an unfair labor practice hearing and drag  
13 out every negative event which occurred in which Carlson was  
14 involved, even those which occurred prior to the merit  
15 award, makes the City's motive for discharge even more  
16 suspect. That, coupled with its subsequent harsh action in  
17 suspending and later dismissing the employee for her conduct  
18 involving the Schnauzer, convinces me the City had more in  
19 mind than simple termination of a "recently less than average"  
20 employee. I believe the vocal manner in which she pursued  
21 her grievance filing and other union activities caused her  
22 to fall into extreme disfavor with management. They were  
23 looking for an excuse to get rid of her.

24 The foreseeable consequences of the discriminatory  
25 termination of Sue Carlson, where her protected activity was  
26 a motivational factor in the decision, is the discouragement  
27 of union activity, Radio Officers Union, supra.

28 V. CONCLUSION OF LAW

29 Sue Carlson was discharged by the City of Billings in  
30 violation of 39-31-401 (1) and (3) MCA.

31 VI. RECOMMENDED ORDER

32 IT IS ORDERED THAT, after this Order becomes final, the






City of Billings, its officers, agents, and representatives shall:

- (1) Cease and desist its violation of 39-31-401 MCA;
- (2) Take affirmative action by reinstating Sue Carlson as an Animal Warden at the City Animal Shelter;
- (3) Make Sue Carlson whole by repaying her for all lost wages, including interest and all benefits which she would have received had she not been terminated on March 10, 1980;
- (4) Meet with union representatives of Sue Carlson and attempt to determine the amount due her under No. 3 above, if a mutual determination cannot be made within ten days, notify this Board so that a hearing may be held and a detailed remedial order issued;
- (5) Post in a conspicuous place in the Animal Shelter copies of the attached noticed marked "Appendix."
- (6) Notify this Board in writing within twenty days what steps have been taken to comply with this Order.

#### VII. NOTICE

Exceptions to these Findings of Fact, Conclusion of Law and Recommended Order may be filed within twenty days service thereof. If no exceptions are filed, the Recommended Order shall become the Final Order of the Board of Personnel Appeals. Address exceptions to Board of Personnel Appeals, Capitol Station, Helena, Montana 59601.

BOARD OF PERSONNEL APPEALS

BY   
JACK H. CALHOUN  
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct  
copy of this document was mailed to the following on the 22  
day of December, 1980:

Kenneth D. Peterson  
City Attorney  
Suite 250, The Grand  
27th Street & 1st Ave. North  
Billings, Montana 59101

Emilie Loring  
HILLEY & LORING, P.C.  
1713 Tenth Avenue South  
Great Falls, Montana 59401



In accordance with the Order of the Board of Personnel Appeals and to effectuate the policies of Title 39, Chapter 31 MCA, the City of Billings, acting through its officers, agents, and representatives, does hereby notify employees in the Animal Shelter that:

It will cease and desist its violation of 39-31-401 (1) and (3) MCA and will reinstate Sue Carlson with appropriate back pay and benefits.

CITY OF BILLINGS

BY \_\_\_\_\_  
CITY ADMINISTRATOR

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_.

This notice shall remain posted for a period of 60 consecutive days from the date of posting and shall not be altered, defaced, or covered.

Questions about this notice or compliance therewith may be directed to the Board of Personnel Appeals, 35 South Last Chance Gulch, Helena, Montana 59601, or telephone 449-5600.